IN THE SUPREME COURT OF THE UNITED STATES.

George W. Allen, as Administrator of John J. Philbrick, deceased,
Plaintiff-in-Error.
vs.
Frank M. Arguimbau, as surviving partner of the firm of Schroeder & Bon,
Defendant-in-Error.

No. 523.

MOTION TO DISMISS THE WRIT OF ERROR TO THE SUPREME COURT OF FLORIDA, OR TO AFFIRM THE JUDGMENT.

Comes now the defendant in error, by Bisbee & Bedell his attorneys, and moves to dismiss the writ of error on the ground: that the Court has not jurisdiction of this action on said writ, because no Federal question is presented under Section 709 of the Revised Statutes, as shown by the Record.

2nd. If said motion is denied, then defendant moves that the judgment be affirmed on the ground that the writ of error was sued out for delay, and the question on which the jurisdiction depends is so frivolous as not to need further argument. Said motions will be submitted the 3rd Monday in March A.D. 1906. BISBEE & BEDELL,
for Deft. in Error.

Copy of above motions and of brief in support thereof, received this 27th day of Feby. A. D. 1905.

(Signed) Hugh C. Macfarlane
James F. Glen
Counsel for Plaintiff in error

IN THE SUPREME COURT OF THE UNITED STATES.

George W. Allen, as Adm'r of the Estate of John J. Philbrick,
Plaintiff-in-Error,
vs.
Frank M. Arguimbau, Surviving Partner, etc.,
Defendant-in-Error.

No. 523.

ON WRIT OF ERROR TO THE SUPREME COURT OF FLORIDA.

Brief on motion of defendant in error to dismiss for want of jurisdiction, or to affirm on the ground that the questions raised on the merits are frivolous.

STATEMENT.

Frederick A. Schroeder, Edwin A. Schroeder, and Frank M. Arguimbau, as partners under the firm name of Schroeder & Bon, brought an action at law in the Circuit Court, State of Florida against the administrator of John J. Philbrick, deceased, on the latter's liability as one of three joint and several makers of two promissory notes for $2500. each.

See Notes, Rec. p 2.

One Herman L. Stricker was the first administrator

of said Philbrick's estate and was duly succeeded by plaintiff in error George W. Allen.
Rec. p 4.

Pending the action all the plaintiffs died except Frank M. Arguimbau, who, as surviving partner, prosecuted the action to final judgment, which on writ of error was affirmed by the Supreme Court of Florida; to reverse which judgment this writ of error to the said Supreme Court is prosecuted.

We shall designate in argument the plaintiff in error as defendant and the defendant in error as the plaintiff, as they stood in the court of original jurisdiction.

Pending the action, the defendant filed numerous pleas attempting to set up a *failure of consideration* of the two promissory notes sued on, all of which pleas were held bad on demurrer. There is no pretence that any of the *said pleas raised a federal question* and consequently are not before this court for consideration.

But, pending the action, the defendant on March 24th, 1900 filed amended pleas Nos. 1, 2, and 3, attempting to set up that the *notes sued on were wholly void* on the ground that the consideration of the notes *was an independent contract* on the part of Horace R. Kelly, the payee, and that in the performance of *that contract* is was contemplated that an Act of Congress would be violated. Demurrer to each of these pleas was sustained. These three pleas are found on pp. 9 to 12 of the Rec.

(NOTE.—On January 25th, 1900, the defendant filed three pleas of which those numbered 2 and 3 *attempted to set up* that the notes sued on were void, for similar reasons stated in the subsequent three pleas of March 24th, 1900. Rec. pp. 5 to 7. But no errers were assigned in the Supreme Court of Florida for sustain-

ing the demurrer to the said *two* pleas of January 25th, 1900, and cannot be considered here.)

FEDERAL ELEMENT.

Defendant, (plaintiff in error), claims that there was a federal element involved in each one of the three pleas filed March 24th, 1900, which confers jurisdiction on this court.

Error is assigned in *this* court for sustaining the demurrer to each of said three pleas; Rec. 36, and the first of said pleas are in the words and figures following to wit:

"And now comes the defendant, by his attorneys, G. Bowne Patterson and Macfarlane & Shackleford, and files these his amended pleas, and for a further plea says that on or about the 18th day of March, A. D. 1893, Horace R. Kelly, *claiming to be a manufacturer of cigars*, agreed with John Jay Philbrick, during his lifetime, that if he, the said John Jay Philbrick, together with George W. Allen and Charles B. Pendleton, would give to him their four joint and several promissory notes for two thousand five hundred dollars each, two of the said notes payable in one year from the date thereof and two payable in two years from the date thereof he, the said Horace R. Kelly, *would have cigars manufactured in Key West, Florida, and in no other place*, according to the terms of his contract with the Havana & Key West Cigar Company, Limited; that the said contract referred to was a *contract between the said Horace R. Kelly and one Max T. Rosen*, the president of the Havana & Key West Cigar Company, Limited, and in said contract the said Horace R. Kelly bound himself to have the said Horace R. Kelly Company, Limited, a corporation then existing, judicially dissolved and after said dissolution, together with himself and other to organize a company under the laws of the State of West Virginia to be known as the Horace R. Kelly Company; that the said

Horace R. Kelly Company, when so formed, *was to enter into an agreement* with the Havana & Key West Cigar Company, Limited, whereby it, in its factory at Key West, Florida, was to manufacture cigars and to fill all orders for cigars secured by the said Horace R. Kelly Company, provided such orders should be approved by the president or manager of the Havana & Key West Cigar Company, Limited. *And it was then and there understood and agreed by and between the said Horace R. Kelly and the said Max T. Rosen, the* president of the Havana & Key West Cigar Copmnay, Limited, *that the cigars so manufactured as aforesaid by the Havana & Key West Cigar Company, Limited at its factory at Key West, Florida, to fill the orders for cigars secured by the said Horace R. Kelly Company were to be removed from said factory or place where said cigars were made without being packed in boxes on which should be stamped, indented,* burned or impressed into each box, in a legible and durable manner, the number of cigars contained therein and the number of the manufactory in which the said cigars had been manufactured. That at the time of the making of said contract *and understanding and agreement between the said Horace R. Kelly and the said Max T. Rosen,* president of the Havana & Key West Cigar Company, Limited, the laws of the United States regulating the manufacture, removal and sale of cigars provided that, before any cigars were removed from any manufactory or place where cigars were made, they should be packed in boxes and that there should be stamped, indented, burned or impressed into each box, in a legible and durable manner, the number of cigars contained therein and the number of the manufactory where said cigars were made, and affixed a penalty for the non-compliance therewith; and the said promissory notes sued on are two of the notes made and delivered to the said Horace R. Kelly in consideration of the promises *and understandings and agreements aforesaid*

and are wholly void; all of which the said plaintiffs well knew at the time of the alleged transfer of the said notes to them; and this the defendant is ready to vertify."

Rec. p. 9.

Defendant relies upon this plea as presenting a federal question. It was demurred to and demurrer sustained by the State Courts'.

See Demurrer, Rec. p. 15, latter part.

If such plea presents a federal question, it must arise from that part of Section 709 of the R. S. which reads as follows: *"or where any title, right, privilege* x x x *is claimed under* x x x *any Statute of the United States, and the decision is against the title, right privilege* x x x *specially set up or claimed."*

Let the contention that this plea presented a federal question be tested by well established principles. If the Supreme Court of the State did not *necessarily decide a federal question,* but could have rested its judgment on some ground independent of such question, *then this court has no jurisdiction.*

1st. The State Supreme Court *was not obliged to decide* that the notes sued on were void upon the facts stated in the plea, for the reason that there was no *assignment of error* in due form on the sustaining the demurrer to the plea by the Circuit Court.

The only assignment of error is as follows, to-wit:—"3rd: that the court erred in sustaining plaintiffs' demurrer to defendants' first plea, filed on March 24th, 1900."

Rec. p. 28.

No ground whatever is stated in this assignment, *pointing out wherein an error was committed.*

The grounds of the demurrer to this plea as well

as to three other pleas filed March 24th, 1900 are on p. 16 of the Record, and in the words following to-wit:—

"And plaintiff demurs severally to each of the four pleas filed by Allen as administrator of the estate of John J. Philbrick on March 24th, 1900 on the following grounds:

1st. *Because neither of said pleas state facts constituting any defense.*

2nd. Because the real consideration of the notes sued on was the promise of Horace R. Kelly to have cigars manufactured in Key West, *and no one of said pleas alleges a breach of said promise.*

3rd. No one of said pleas avers that the alleged proposed contract between the two companies in said pleas stated, and alleged to be illegal, was ever consummated or executed or anything done thereunder.

4th. *That if cigars were manufactured in Key West, under the said contract between the said two companies in the said pleas stated, the defendant and his intestate derived the same benefit and received the same consideration for the said notes, whether said contract was legal or illegal."*

Rec. 16, top.

The Supreme Court of Florida was not *obliged to consider* this assignment of error, it specified no *error* and *was too general and vague to be considered.*

"An alleged error will not be considered by the Appellate Court unless it is specifically pointed out."

Newberry v. State, 26th Fla. 334, Syl. No. 3.

The State Court gave none but a per curiam opinion in the following words:—

Per Curiam:

This cause coming on for final hearing upon the transcript of the record and briefs of the respective parties, and having been duly considered by division A, and no error being made to appear, it is, therefore, considered, ordered and adjudged by the court that the judgment of the circuit court, to review which this writ of error was prosecuted, be and the same is hereby affirmed at the cost of the plaintiff in error.

Rec. p. 32.

If "the case may have been decided *on the form of the remedy* which the practice in the State Court required the plaintiff to adopt, or on the technical insufficiency of the pleadings" this court has no jurisdiction.

Commercial Bank vs. Rochester 15. Wall 639-642.

We therefore submit that it was not necessary for the State Court to pass upon the supposed federal question for the reason *that it was not* raised or specified in the assignment of error, which was so defective that the court was not obliged to consider it at all. The assignment specifies no particular error. It merely alleges error in the most general way in sustaining a demurrer based *on four grounds*. For a like reason, writ of error was dismissed in Harding vs. Illinois, in Advanced Sheets S. C. Reptr. Feb. 1, 1905, which controls the present case.

2nd. The State Court might have decided that the plea as drawn did not call for a decision, whether or not the notes were void, because that question was not before it.

The plea in question set forth above and on p. 9 of the Record avers: (a) "that Horace R. Kelly (the payee) would have cigars manufactured in Key West, Florida and in no other place." (b) "that he would have the cigars manufactured *"according to the*

terms of his contract with the Havana & Key West Cigar Company, Limited: (c) that the *said contract referred to was a contract* between the said Horace R. Kelly and one Max Rosen," and that in *said contract*, Kelly bound himself to have Horace R. Kelly Company *Limited* dissolved, and to create under the laws of West Virginia *a new Company to be known as* the Horace R. Kelly Company (the Limited omitted), and when said new Company was formed, *it was to enter into an agreement* with the Havana & Key West Cigar Company Limited, whereby *it*—the latter Company,—*was in its factory* at Key West, Florida to manufacture cigars and *to fill all orders for cigars secured* by the said Horace R. Kelly Company. Up to this *point* in the plea, it purports to state and set forth *what* Kelly *had agreed to do in his contract with* Max T. Rosen, which contract was fairly presumed, and is to be presumed *to be in writing*.

Up to this point in the plea *there is no pretence that* Kelly or any person intended to violate any Act of Congress.

The next averment in the plea is as follows:

"And it was then and there understood and agreed by and between the said Horace R. Kelly and the said Max T. Rosen"—that cigars when manufactured, were to be removed from the factory in violation of an *Act of Congress*. But, it is not averred in the plea that *such understanding and agreement was any part of the contract* between Kelly and Rosen. The fair inference from the plea, (construed most strongly against the pleader), that such understanding and agreement (that the Statute was to be violated) was an oral *one* between Kelly and Rosen; and consequently the plea was bad on the ground that it could not be proven without admitting oral evidence *to vary, by inserting into* a written contract, new terms and provisions. This made the plea demurrable without considering the plea from any other point of view.

Solary v. Stultz, 22 Fla., 263, Syl. 3—and p. 268.

It was proper therefore for the State Supreme Court to decide that as the *part of the plea* setting up an intention in the future to violate a Statute *could not be legally proven, it was not necessary* for it to decide whether the alleged illegal part of a contract *made the notes void or not.* (The fact was that the State Circuit Court had the written contract between Kelly and Rosen before it as a part of the files of the case, *and that such contract did not contain* the above alleged intention that an Act of Congress should be violated.)

3rd. This court is without jurisdiction for the further reason that the plea does *not set up any peronal right, or personal right of property* under any Act of Congress, but sets up a right of a third party to-wit: the United States to have the Revenue laws enforced. This proposition is maintained in the following cases:

Hale v. Gaines, 22 How.., 160.
Austin v. Anderson, 7th Wall. 694.
6th Rose's Notes, 1066.
Long v. Converse, 91 U. S., 114.
Cl ade v. York, 168 U. S. 648.

"Setting up a title in the United States by way of defense is not claiming a personal interest affecting the subject in litigation."

Hale v. Gaines, 22 How, 160.

"Under the 25th Section of the Judiciary Act it is not every misconstruction of an act of Congress, which can be re-examined: *the decision must have been against some right &c. so claimed under such act."*

Montgomery v. Hernandez, 12 Wheaton, 129.

But at bar it is obvious that there was no controversy over the *construction* of any Act of Congress, and the State Court was not called upon to consider any.

The *personal right* of the makers of the notes under the payees promise was to have cigars made in Key West. But this right was derived wholly from Kelly's said promise, contained in his contract to that effect with the maker of the notes. No part of this right was acquired under any federal Statute, nor is there any claim in the plea that the State Court *denied this right* of the defendant.

This right to have Kelly have cigars made existed if there had been no federal statute regulating the mode and manner of boxing and stamping *before* removed from the factory.

It is idle to contend that the makers of the notes had *any right* within the meaning of that word in Section 709 of the R. S. to have the cigars *after they were manufactured*, packed in boxes, &c. in compliance with the statute.

This was *the right* of the United States and the makers of the notes did not possess such right to any greater extent than any other citizen of the 80,000,000 of citizens of the United States. Nor did the makers of the notes possess any right that the Statute should not be violated, not possessed by every other citizen.

Indeed,—Kelly, the payee, had performed his promise, the consideration of the notes, by *having cigars manufactured*. He was not bound by his promise as stated in the *plea, to ever pack the cigars in boxes of any kind*, nor to remove them from the factory in which they were made, nor to sell them. His contract was not to manufacture *and sell* but to manufacture. The plea

does not state *how long* Kelly was to make cigars nor how many he was to make, consequently if he made cigars for *one month, one week,* or *one day,* he performed his promise *as stated in the plea,* to have cigars made and the consideration for the notes was complete, even though the performance of his promise, and not the promise itself, was the consideration of the notes.

The amount of the consideration is immaterial; certainly so, *on the* question of jurisdiction.

But, it is a settled rule of law that where the consideration of a promissory note is *an independent executory contract* of the payee to be performed in the future, *both made at the same time, the promise in the contract* to perform, and not the performance, is the consideration of the notes. The makers must pay their notes, and if the payee breaches his promise they must sue him for damages for the breach.

6th Vol. (2 Ed.) Enc. of Law, 785-
Turner v. Rogers, 121 Mass.
Waterhouse v. Kendall, 11th Cush., 128-167.
Arthur v. Hart, 17th How., 6-16.

The State Court could well have decided that the *only right* the makers of the notes possessed was *Kelly's promise* to make cigars, that this was not derived from any Act of Congress. That the defendant cannot invoke a contemplated violation of a Statute, *regulating* the boxing of cigars, as making Kelly's entire contract void or illegal, and thereby claim a *right* under an Act of Congress, is settled.

What the defendant complains of is that a *fraud on the Revenue laws of the United States was intended* by violating them, and that the maker of the notes *had a right under such laws to have them obeyed. If such* fraud was intended, it is not alleged that the makers of the notes *knew it* when they signed the notes, and they were not parties to it. They cannot be heard to

complain, especially after presumably Kelly's contract to make cigars has been performed.

The following are the Sections of the Revised Statutes regulating the business of manufacture of cigars specified in the assignments of errors in this court. They were not specified at all in the Supreme Court of Florida.

Section 3390 requires every manufacturer to "enter daily in a book, the form of which shall be prescribed by the Commissioner of Internal Revenue, an accurate account of all the articles aforesaid purchased by him, the quality of leaf tobacco, cigars, stems, or cigar boxes of whatever description, manufactured, sold, consumed, or removed for consumption, or sale, or removed from the place of manufacture; and shall, on or before the tenth day of each and every month, furnish to the collector of the district, a true and accurate abstract from such book, verified by his oath, of all such purchases, sales and removals made during the month next preceding. In case of refusal or wilful neglect to deliver the inventory or keep the account, or furnish the abstract aforesaid, he shall be fined not less than five hundred dollars, nor more than five thousand dollars, and imprisoned not less than six months nor more than three years."

Section 3393 requires every manufacturer to paste on each box a label "on which shall be printed, together with the proprietor's or manufacturer's name, the number of the manufactory, and the district or state in which it is situated, these words: 'Notice:—The manufacturer of the cigars herein contained has complied with all the requirements of law. Every person is cautioned under the penalties of law not to use this box for cigars again.' Every manufacturer of cigars who neglects

to affix such label to any box containing cigars made by *or for him*, or sold or offered for sale by or for him, and every person who removes any such label, so affixed, from any such box, shall be fined fifty dollars *for each box* in respect to which such offense is committed."

Section 3397 provides that "whenever any cigars are removed from, any manufactory, or place where cigars are made, without being packed in boxes as required by the provisions of this chapter, or without the proper stamp thereon denoting the tax, or without burning into each box with a branding-iron the number of the cigars contained therein, *the name of the manufacturer* and the number of the district and state. . . . . or are sold or offered for sale not properly boxed and stamped, they shall be forfeited to the United States. And every person who commits any of the above described offenses shall be fined for each such offense, not less than one hundred dollars nor more than two years."

Section 3397 further provides for the punishment of any person "who removes from the place of manufacture any cigars not properly boxed and tsamped as required by law" by fine not less than one hundred dollars and not more than one thousand dollars and imprisonment not less than six months and not more than three years, and declares the offense a felony.

And said Section 3397 is the Section which is mentioned in the first assignment, Rec. 36.

In Udell v. Davidson, 7th How. 769, the syllabus reads as follows: "A defense founded on the allegation "that the defendants' "*conduct* was in fraud of an Act "of Congress, is not a matter which this court can ex- "amine *at his instance* on a writ of error, under the 25th "Section of the Judiciary Act of 1789." Much less

where there is an unexecuted intention of a *third* party to commit fraud.

In the case at bar, the plea *does not even allege that any fraud of or violation* of an Act of Congress was *actually committed but only contemplated.* Indeed the plea does not aver that the contemplated contract between the *two corporations was ever made.*

So that in the final analysis, the defendant in his plea only sets up *a right* that *two third parties should not intend to make a contract in the future which if made, and subsequently performed* might be a fraud on the Revenue laws.

In Walworth v. Kneeland, 15 How. 348, the syllabus reads as follows:—"Under the 25th Section of the "Judiciary Act of 1789, a party cannot come to this "court because a State Court has refused *to allow his defense that the contract sued on* was made by him and "the plaintiff in fraud of an Act of Congress. This is "not *a right or title* under an Act of Congress, within the "meaning of the 25th Section."

Cited, approved and applied in Conde v. York, 168 U. S. 642: in Railroad Co. v. Morgan, 160 U. S. 288, and in Railroad Co. v. Fitzgerald, 160 U. S. 557.

Gill v. Oliver's Executors, 11th How. 529, is peculiarly applicable.

The mere *abstract right,* if any, in the makers of the notes to have the Federal Statute complied with *without alleging any injury to them,* is unimportant, and a *moot question.*

Hooker vs. Burr, 194, U. S. 419.

Again: The Record discloses that even if the makers of the notes could raise the question of the

contemplated fraud on the Statute, the decision of the State Court could legally be based on the ground that the promise of Kelly to make cigars was the consideration of the notes; that *such promise was legal;* and that the *contemplated future fraud* on the Statutes was too remote from such promise to make the latter illegal.

In Dibble v. Bellingham Bay Land Co., 163 U. S., 69, the court said:—

"If the record discloses that a question has been "raised and decided adversely to a party claiming the "benefit of a provision of the Constitution of the United "States, and another question not Federal has also been "raised and decided against such party, and the decision "of the latter question is sufficient notwithstanding the "Federal question to sustain the decision, this court will "not review the judgment.

Eustis v. Bolles, 150 U. S. 361-366.

"If it appears that the court did in fact base its "judgment on such independent ground, or, where it "does not appear on which of the two grounds the judg- "ment was based, if the independent ground on which it "might have been based was a good and valid one, "sufficient in itself to sustain the judgment, this court "will not assume jurisdiction.

Klinger v. Missouri, 13 Wall. 257."

And it is not to be overlooked that this plea does not purport to be one of *failure* of consideration, but is a plea claiming upon the facts stated in it that the notes sued on *were wholly void ab initio.* Because a *non-compliance* with a Federal Statute, was intended.

But the general rule is that though the promise of the payee in an independent contract, or the act to be done as the consideration of a promissory note, is a violation of an Act of Congress, still the note is not

void, unless the Act of Congress *expressly declares the note void*, which is not this case.

Tiedeman on Commercial Paper, Sec. 280. Id. Sec. 178.
21st Wall., 241-248.
2nd Ed., Vol. 4th Enc. of Law, 191-192.

And this is especially so where *the alleged violated provisions* of the Statute are only *regulations for the purpose of collecting taxes and revenues.*

Harris v. Rummels, 12, How. p. 79 and cases therein cited.
5th Vol. Rose's Notes, p. 70.

In such case no one can raise the question but the United States.

Thompson v. St. Nicholas Nat. Bank, 146 U. S. 240-250.

Again: it is well settled that *"an obligation sued on will be enforced though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case."*

Armstrong v. Bank, 133 U. S. 467.
Armstrong vs. Toler, 11th Wheat., 258.

Here the consideration of the notes, independent of the alleged intended violation of the Statute as to packing and removing from the factory, was Kelly's *promise to have cigars manufactured.* This was wholly disconnected from Kelly's duty to see that the cigars *after they were made* were boxed and stamped according to the Statute. Besides from anything that appears in the plea, neither Kelly nor the Horace R. Kelly Company ever removed any cigars not packed and stamped according to law, or violated any statute in any respect.

The plea does not so allege. The presumption is that the Statutes in question were complied with, in the absence of any *averment* to the contrary, even though in the alleged contract between The Horace R. Kelly Co., and The Havana & Key West Cigar Co., their violation was contemplated. Besides, the plea does not aver whether any cigars were made or not *but it is presumed they were,* for every man is presumed to have done his duty under a contract. And assuming that Kelly's contract was performed, the makers of the notes after such performance, *and after receiving the consideration expected,* cannot plead as a defense that such contract was illegal or void.

Brooks v. Martin, 2 Wall. 70-71, *where the contract was declared void by the Statute.*
Kimbro v. Burdett 22 How., 256.
11th Wheaton, 258.
2nd Vol. Rose's Notes, 482.

4th. As defendant in the view of the case that Kelly's contract *was performed,* could not plead *any illegality in the contract,* as a defense, the State Court may have and could properly have rested its decision sustaining a demurr to the plea on the distinct ground that defendant after performance could not raise the question of the illegal consideration. Such a ruling would be on a question of *general law,* and would not be a *denial* of any *right under* any Federal Statute.

And it is submitted that the asserted federal element was too remote, and has been so often decided that it would now be treated as frivolous, and the motion to affirm the judgment should be granted.

Blythe v. Hickley 180 U. S. 333-338.

The 2nd and 3rd pleas filed March 24th, 1900, Rec. pp. 10-11 are precisely like the 1st plea above discussed,

except that it is alleged in such 2nd and 3rd pleas that some *other provision* or Sections of the Statutes regulating the manufacture of cigars *was to be violated*. Such 2nd and 3rd pleas are bad both as to their raising any federal question and as to their merits, for the same reasons that the 1st plea is bad; and it is unnecessary to repeat our argument.

And the assignment of error for sustaining demurrer to the said 2nd and 3rd pleas is in the same defective form as that on the 1st plea.

See Assignments, Rec. p. 28.

5th. This court has no jurisdiction on the following grounds:

The declaration alleges that Kelly, the payee, at the time the notes were made indorsed the notes to the Horace R. Kelly Co., and the latter Company indorsed them to the plaintiff.

Now, each of these pleas of March 24th, 1900 aver that the *plaintiffs when they took the notes had notice of what* the pleas state as making them void, *but neither of these pleas aver that The Horace R. Kelly Co.*, when it received the notes had notice. Therefore, The Horace R. Kelly Co., not having notice, by its indorsement passed a good title to the plaintiffs, even though the latter had notice.

There is no averment in any of these pleas that the plaintiff *took* the notes *after maturity*. And the declaration avers that these notes were indorsed and passed to the plaintiff at the *time they were made*. p. 2.

The State Court could therefore have placed its decision on the general rule of law that one taking with

notice, from one without notice, has a good title without deciding any other question.

And this illustrates that the notes in the hands of an innocent holder without notice of the alleged illegal contract as their consideration would not be *void* but valid.

Tilden vs. Blair. 21, Wall. 248, and cases cited.

There are therefore abundant grounds upon which the State Court could have placed its judgment sustaining demurrers to these pleas, without deciding any right claimed as a defense that the notes were void, because the contract alleged to be the consideration contemplated that during its performance an Act of Congress was to be violated. Besides such a decision would be *one of general law*. Of this later on.

OTHER PLEAS.

On the 2nd day of February A. D. 1903, the defendant filed six pleas numbered 1 to 6 inclusive.

Rec. p. 18 to 21.

The 4th, 5th and 6th pleas are relied upon as raising a federal question, as asserting to a right of defendant under an Act of Congress, which was denied by the State Court.

See assignments of error in this court p. 36.

To each of these pleas Nos. 4, 5. and 6 a demurrer was sustained.

See grounds of demurrer, Rec.. p. 22 last part.

These pleas are identical in substance with pleas 1, 2, 3, already discussed, save in the following particulars, to-wit:

1st.—The averment in the said 1st, 2nd, and 3rd

pleas above discussed, the clause that it was "understood and agreed" by and between Kelly and Rosen, that in the contract between Horace R. Kelly Co., and The Havana & Key West Cigar Co., there should be a provision as to violating Federal Statutes, is omitted in these pleas, 4th, 5th and 6th, and *it is averred* in the latter pleas that the contract between the two corporations contained in itself the agreement, that in the contract between said corporations Acts of Congress were to be violated. *Thus the objection that a part of the pleas resting in parol and not provable is removed.*

2nd. These pleas 4th, 5th and 6th allege the *consideration of the notes was illegal,* whereas in pleas 1, 2, and 3 above discussed, the notes were alleged to be *void.*

3rd. In pleas 4, 5, 6, it is averred *that The Horace R. Kelly Co.,* as well as plaintiff *when it took the notes had notice, &c.* In all other respects the two sets of pleas are substantially identical.

The 4th of this second set of pleas reads as follows:

4. "And for a further plea to the declaration of the plaintiff the defendant says that the notes sued upon, and each of them, were executed and delivered by the said John J. Philbrick, George W. Allen and C. B. Pendleton to the said Horace R. Kelly solely on the consideration of an agreement and promise of said Horace R. Kelly whereby he undertook that cigars should be manufactured at Key West, Florida, and at no other place, *in accordance with and pursuant* to the terms of a certain contract to be made between Horace R. Kelly and Company, a corporation which he undertook to organize, and the Havana & Key West Cigar Company, Limited, whereby the latter was to manufacture, at its factory in Key West, cigars to fill all orders for

cigars secured by the said Horace R. Kelly & Company, and whereby the said cigars, when so manufactured, were to be removed from the said factory or place where the same were made without being packed in boxes on which should be stamped, indented, burned or impressed into each box, in a legible and durable manner, or in any manner, the number of cigars contained therein and the number of the manufactory in which said cigars had been manufactured, all of which was contrary to law, wherefore the consideration upon which the said notes sued on upon were given was illegal; and the defendant alleges that Horace R. Kelly and Company, Limited, and the original plaintiffs herein, at the time of the indorsement and transfer to them of the notes sued upon, had notice and knowledge of all the matters herein set forth. And this the defendant is ready to verify."

Rec. 19.

Assignment of Error in this court, p. 36 No. 4.

It is obvious that this plea, save in respect to the *three points* of difference with the first set of pleas above pointed out, is subject to all the objections as to presenting a Federal question that the first set of pleas are:

1st. That it does not present a case of any personal right in defendant under an Act of Congress, and a denial of such right by the State Court.

2nd. That Kelly's promise to have cigars manufactured was legal, and this makes a legal consideration independent of and without relying upon the alleged contemplated violation of the Federal Statutes between the two corporations mentioned in the plea: and consequently the notes can be legally enforced.

3rd. That Kelly's contract, the consideration of the notes, having been performed (there is no averment in the plea that it was not), the makers of the notes cannot

defend after performance by setting up that any part of the consideration was illegal.

Such makers cannot have and enjoy the full consideration of having had cigars manufactured and then turn round and say: True it is we had the consideration of having cigars made, but *in the mode* of boxing, stamping, and removing the cigars, or in some other respects, it was intended by third parties in whose factory the cigars were made *to* violate a Federal Statute *after the cigars* were made.

Such contemplated or intended violation of the Statute is too remote from the legal consideration of having cigars manufactured, to affect the legality of the consideration .

The makers of the notes, *playing the role of public benefactors, in an effort to increase business in the City of Key West and its commercial importance,* received precisely the same benefit *from the manufacture of cigars* if they were packed and removed &c., in an illegal manner as they would have received if packed and removed, &c., in strict compliance with the Acts of Congress.

And the conclusion is inevitable from any logical standpoint that these pleas did not present any question of *right under* an Act of Congress, which, the State Court has denied.

The point attempted to be made in the above plea No. 4, is that the *entire consideration was illegal* and *such illegality consists entirely in an intended future non-compliance* with statutory regulations for securing the payment of taxes. Such non-compliance was not to be *by Kelly,* the payee of the notes, but *by the Havana & Key West Cigar Company Limited,* in whose factory the cigars were to be made.

This simply is a contention that a *general rule of law,* to-wit: that illegality in the consideration for a

promissory note renders the note invalid, *should be applied in this action.*

We repeat the plea does not allege that such alleged intention to disobey an Act of Congress was ever consummated, for there is no pretence in the plea that any Act of Congress was *actually violated* by anybody.

It is therefore perfectly consistent with the plea, that the said Company did actually comply with the Statutes in all respects for it certainly would not be long engaged in making cigars before Revenue officers would know that the Statutes were being violated, if in fact they were being violated, and it is to be presumed that when the cigar manufacturer *knew it was* violating the Statutes, it would cease doing so, rather than incur the penalties and forfeitures declared therein. An intention to violate a statute, unaccompanied with any act to that end is *not illegal,* therefore the makers of these notes cannot maintain that the consideration was illegal on the mere averment of an *intention* to violate the Statute, which was never carried into effect by any criminal, or immoral act.

We repeat *the presumption is* that in point of fact, the cigars were manufactured and these Statutes were complied with, especially so as it does not appear that anybody was prosecuted for their violation. If the cigars were not manufactured, then of course no Statute was violated. As the plea does not allege whether or not, Kelly caused any cigars to be made, the averments in the plea rest on no foundation *save the* circumambient air:

Again,—It is not averred in the plea that the Horace R. Kelly Company was ever organized, or that the al-

leged *contemplated contract* between that Company and the Havana Company *was ever made*..

Every fact stated in the plea may be true and yet *it may be true* that Kelly manufactured (or caused cigars to be manufactured), *and that after* they were manufactured all the Federal Statutes respecting such a business were complied with.

The vice of the plea is the assumption that Kelly, by his contract or promise—which was the consideration of the notes, *was bound to violate the Statutes* while making cigars, and that the maker of the notes had the legal right under said contract *to insist that* he should violate or have the corporations violate the Federal laws. And on this theory Kelly's contract was illegal. But *said contract was divisible* into *two distinct* parts: one of such was *between the makers of the notes and Kelly:* by which he agreed to have cigars made in Key West. The other was between Kelly and *a third party, containing alleged stipulations to be effective after the cigars were made,* as to an illegal mode or manner of handling and disposing of the cigars.

The State Court could have properly said, *the mode and manner of doing the thing is merely directory,* and is not of the essence of it, and all the rights of the makers of the notes consisted of having *cigars manufactured at Key West.*

If in their manufacture *one hundred or five hundred* persons were employed, the increase in the business of Key West, which was the object aimed at by the makers, would be the same whether the cigars were legally or illegally packed in boxes, &c. In this view of it, it is absurd to say that the makers of the notes have been *denied any right under an Act of Congress.*

The 5th and 6th pleas of the set filed February 2nd, 1903 are exactly like the 4th, except in the mode and manner in which it is alleged the Statutes were to be violated.

See Pleas, Rec. p. 20.

The assignment of errors upon them are in the same defective form, and the State Court was not bound to notice them.

See Assignments Nos. 7-8, and 9. Rec. p. 28.

6th. The State Court could have properly refused to consider any of these six pleas filed February 2nd, 1903, Rec. p. 18, to 21, on the distinct ground that they are so *utterly inconsistent that proof of the truth of one would establish the falsity of another.* It is true Sec. 1062 R. S. of Fla.,, says: "But it shall be no objection to any plea that it is *contradictory* to any other plea, filed by the same party in the same case."

But allowing contradictory pleas was never intended to permit such a result. The Supreme Court of Washington in Seattle National Bank vs. Jones, 13th Wash. 281, S. C. 48, L. R. A. 177,—dealt with just such a case and ruled such inconsistent pleas not permissible even under a statute allowing inconsistent pleas.

All of said six pleas should have been stricken out. False swearing should not be encouraged.

48 L. R. A. p. 185.

When a statute speaks of allowing contradictory pleas to be filed, it means pleas *inconsistent by implication of law and not such as involve a direct denial of a fact previously pleaded.*

And where pleas are so utterly inconsistent *that*

proof of the truth of one would establish the absolute falsity of the other, they are not admissible.

To require a court to listen to evidence by a defendant *to prove that one of his pleas is absolutely false would make judicial proceedings a farce.* Although, the evidence would prove the truth of an other.

48 L. R. A., 185.

To illustrate, the defendants 3d plea filed February 2d, 1900 p. 19, expressly says that the consideration for the notes sued on was Kelly's promise *to perform a contract* he had previously made with Rosen *"and for no other or further consideration."*

Now, if that plea is true, pleas Nos. 1, 2, 4, 5, 6, filed at same time as the 3d plea are necessarily *absolutely false in fact,* and not by implication of law.

See brief on this subject.

48 L. R. A. p. 188 at seq.

Objection may be raised by motion to strike or demurrer.

See brief, 48 L. R. A. p. 208.

In this view, the State Court should have disregarded such pleas. But the court was right in sustaining a demurrer to them on this ground.

The State Court may have decided and could properly have decided to sustain a demurrer to each of these pleas on the ground that no Act of the Legislature could be so construed as to require a court of justice to try issues so *absolutely inconsistent* (not *merely contradictory, that proof of the truth of one would prove the falseity of another.* If the jury should find one issue, in favor of the defendant, yet he has by another

plea sworn to by him, *admitted on the record that the fact so found is untrue*

7th. The State Court could have rested its judgment upon either the 2nd or 4th grounds of demurrer, without deciding whether the consideration of the *notes were* void as alleged, for the reasons alleged in the plea.

See grounds of Demurrer Rec. p. 22, near bottom.

The plea does *not allege* that the *Payee, Kelly, breached his promise* to have cigars manufactured in Key West, which was the consideration of the notes; and if cigars were manufactured, which the court had a right to assume from the plea, that fact not being denied, the makers of the notes received *a consideration* therefore; and the same consideration they would have received if there had been no pretence of any illegality in the terms of the contract between the *third parties mentioned in the plea.*

SOME FURTHER VIEWS.

8th. The plea presents the proposition that if the plaintiff took the notes before maturity *with notice* of the alleged contract wherein the alleged non-compliance with the statute was contemplated, then he is not an innocent holder, even though he paid full value for the notes.

This is tantamount to a contention that no legal negotiations of the notes could be made at all, because the indorsee and purchasers had notice of the *one fact that, after the cigars were made, a violation of the statute was contemplated.* And this, as contended, made the *whole consideration illegal.*

If this were true, then it would follow that the proceeds of the notes could *never be used* to enable Kelly

to have cigars made,—the sole object of making the notes. It would also follow that *Kelly must breach his promise* to have cigars made, and the notes and Kelly's contract, or promise, to have them made, *must all be regarded as nugatory and void.* Such evidently was not the intent of the parties.

Test the alleged illegality in the consideration as follows: Suppose the makers of the notes after they were negotiated had sued Kelly for damages for a breach of his promise to have cigars made, and Kelly had set up the defense by a plea that his promise was illegal *in that he* had caused a contract to be made between two corporations, by which one of them had agreed with the other to make the cigars in his factory, and that said corporation intended to remove the cigars from his factory, in violation of the statutory regulations.

The answer to such a plea on demurrer thereto, would be:

(a) Kelly was not legally bound by his promise with the makers of the notes to cause such a contract to be made: and the making of such a contract was his own *voluntary* act, and his own voluntary wrong to which the makers were not parties.

(b) If Kelly applied a part of the proceeds of the notes to aid these parties to do an illegal act after applying a part to doing the legal act of making cigars, it was Kelly's voluntary action, to which the makers of the notes were not parties.

(c) It was Kelly's duty under his promise to have cigars legally made, and to conform to all statutory regulations after they were made, so that their manu-

facture should not be interrupted in consequence of such regulations being violated.

(d) Kelly could not enjoy the benefit of the notes and their proceeds, and defeat recovery for the breach of his promise, by taking advantage of his own wrong.

(e) It is a much plainer case than where an illegal contract has been performed,—one party cannot hold the proceeds of performance and not perform his part. The above being true in law, the converse is true, in an action against the makers.

MERITS.

Therefore if a Federal question was involved and necessarily decided by the State Court, it was decided correctly and the judgment should be affiirmed.

And this for some further reasons.

The question thus presented *was a question of general law.* The *right of the makers* to have the consideration declared illegal and the notes invalid, was not any more a different right because the acts contemplated where a violation of a Federal Statute than it would have been if a violation of *a statute of the State* had been contemplated.

The question presented was whether, upon the facts stated in the plea, *the consideration was of such an illegal character as rendered the notes invalid,* and this was plainly a question of general law, in respect to which there may be a conflict of authority dependent upon the *quality of the illegal acts,* whether heinous or trivial in their nature.

If the consideration was illegal it did not become

a Federal question simply because the illegality consisted in an intended violation of a Federal statute, but was a question of general law arising in the case as to which the decision of the Florida Court was final.

The makers of the notes could not possibly have had a right to have the consideration declared illegal, because its illegality consisted of a contemplated violation of a Federal statute, if they would have had no right to have the consideration declared illegal, if its illegality had consisted of a contemplated violation of an act of the English Parliament, of the Legislature of any State.

It is a matter of *public policy of all States and all governments* that contracts based on *illegal considerations* shall not be enforced; and the decision that it is so illegal is based upon general rules of public policy and general rules of law which control such cases. (Hanover v. Doane, 12 Wall. 349) But there is abundant authority that a contract is not necessarily not enforcible simply because in its performance an illegal act was intended.

It depends on the quality and nature of the illegal
12, Wall. 349.

Here the alleged contemplated illegal act was in no proper sense the consideration of the notes, but only an *incident* which was to happen *after the performance of Kelly's promise* to have cigars made. The fact that some statutory regulations were to be violated by the Havana Co. after the cigars were made cannot logically be regarded as *tainting with turpitude or illegality Kelly's promise to have them made.*

The utmost the defendant's contention can amount to is that the defendant made his note to Kelly for the

sole purpose of furnishing him with money,—proceeds of the notes—*to enable him to violate a statute*:—and that so taints the notes sued on with illegality that the law of *public policy* prohibits a recovery thereon.

But, obviously, the case is not within that rule of law.

The primary and dominating intent and purpose of the makers was to provide Kelly with the means of having cigars made in Key West, in order to increase the commerce and business of that city. The makers were acting as public benefactors. The plea *does not allege that when* the notes were made and delivered to Kelly, the makers knew of the contemplated alleged contract *to be made thereafter* in which contract *between two corporations* (one of which was not then organized) the plea avers it was to be provided that a *statutory regulation* should be violated. This being so, there was no moral turpitude attaching to the makers of the notes by which their *consciences could be tainted.* As the plea goes, the consideration for the notes was *Kelly's promise* to have cigars manufactured. If Kelly consented in his contract with Rosen that in a subsequent contract to be made between the two corporations, *one* of such corporations should, after cigars were manufactured, violate such statutory regulations, enacted to secure the collection of taxes, such a consent could hardly amount to a taint of his conscience, or any appreciable or material turpitude on his part. Such consent on his part was a negative or negligible quantity, and wholly immaterial in law. This for the plain reason that *as the plea states* the Havana and Key West Co., were to manufacture the cigars *in its own factory*, and the contemplated violation of the statute *was to be by that Co., over which Kelly could have no control whatever, and for whose action Kelly was not responsible.* If therefore the Statutes

were to be violated as stated in the said plea No. 4 (and in 5 and 6), neither the makers of the notes nor Kelly the payee were parties to, or in any way responsible for the contemplated illegal acts by the said corporation. *Kelly's promise, the consideration for the notes, is still existing and untainted. Not only this, but as soon as Havana &c. Co., commenced to make cigars Kelly's promise to have cigars made has actually been performed.*

In other words, it is plain that Kelly's promise to have cigars made cannot be deemed *to be tainted with any illegality,* simply because the Havana Co., which was to make them intended to violate a statute. Said Co., could violate the statute or refrain from doing so *regardless of Kelly's alleged prior consent.* Thus it is seen that Kelly's promise is not tainted with any actual or intended violation of a statute, or illegal act *by him,* or any for which he could be held morally or legally responsible.

Speculating or theorizing a little further upon this most *unique and extraordinary plea* (apparently fabricated for purposes of delay) there is a still further result.

Obviously, the proceeds of the notes would be applied in renting a factory, buying tobacco, and paying the expenses of manufacture of cigars,—*all legal objects.* If the cigars *were not to be boxed, stamped, &c., no money would be needed in not doing those things, consequently no part of the proceeds of the notes* could possibly have been intended to be used, or could possibly be used to carry out the intent to violate the statutes.

Besides, all the proceeds of the notes being applied as above for legal objects, *more* cigars could be manufactured *than if part* of such proceeds were applied in buying *boxes and stamps &c.* Thus the makers of the notes would actually receive a larger benefit by way of

increased commerce, by the alleged contemplated illegal *acts of omission being done than if not done.*

Consequently, the makers of the notes are not in *position* to set up that the consideration of the notes was illegal.

The case bears no analogy whatever to cases where a defense of illegality of consideration has prevailed.

ANOTHER POINT.

Where the alleged illegality in the consideration consists of acts merely *mala prohibita,* for which a penalty is imposed, *and the acts are not of great moral turpitude,* the contract sued on will be enforced. This distinction is clearly made in the following cases:

Hanover v. Doane, 12 Wall, 342:
Thomas v. Richmond, 12 Wall., 356:
Armstrong v. Toler, 11 Wheat., 258:
Hodgson v. Temple, 5 Taunt., 181:
De Groot v. Van Duzer 20 Wend., 402.

Again, where the alleged illegality of the consideration consists of *Mala prohibita* and not *mala in se,* such as aiding to commit murder or treason, the considera tion is not *necesarily* illegal, and the court will examine the *whole statute to see if the legislature intended that a contract contrary* to the statute should be viod or illegal. Harris v. Rummels 12 How. 79-86, where it was held the contract was not void.

The doctrine of Harris v. Rummels was applied in Gold Mining Co. v. National Bank, 96 U. S. 640, and in National Bank v. Mathews, 98 U. S. 627.

Moreover, in order to invalidate the contract of

Kelly, the makers of the notes *must know that he intended* to violate an Act of Congress. "A mere suspicion or even conviction *without actual knowledge of an intention to violate* law is not sufficient."

Savage v. Mallory, 4 Allen, 492.
Tiedeman on Commercial Paper, Sec. 198, pp. 329-330.

And this is the rule at common law,

Ely v. Webster, 102 Mass. 304-307.
Adams v. Coulliard, 102 Mass. 167.

Besides in the case at bar, it was impossible that any part of the proceeds of the note could be applied to acomplish the illegal act enjoined by statute consisting of *a refusal to do* the act enjoined.

There is no averment in the pleas that neither the makers or Kelly *knew* the proceeds of the notes were to be applied to an illegal purpose. Certainly none that the makers knew it.

So, it will not affect the validity of the paper if the seller did *not know at the time that the intended act was illegal.*

Stone v. Hooker 9th Cowan, 154.
Coventry v. Barton, 17 Johns. 142.

This is not averred.

So it has been held that *"mere knowledge* of the vendor that the goods he is selling are to be used for an illegal purpose, *without his participation in that illegal intention,* will not invalidate a note given for the purchase money."

Tiedeman on Comm. Paper, Sec. 198, p. 328, and case cited in Note 2.
Hodgson v. Temple, 5 Taunt. 181.

But it has already appeared that there was no moral

turpitude in the makers of the notes, or in Kelly upon the facts aleged in the plea. As shown elsewhere, even though performance of Kelly's promise was not the consideration, but its performance was, if he did perform, the makers having received the consideration cannot plead the alleged illegal acts as a defense.

No time is stated in the plea when performance was to commence or end, and, consequently, it is not alleged that any law was in fact violated. And if Kelly's promise has been broken by failure to have cigars made, the makers' remedy is to sue him for the breach, and there is no illegality in his promise which he could set up as a defense. He certainly could not be heard to plead that whilst his promise contained no illegal acts, said corporation did intend to violate a statute.

It is submitted that the question which is relied upon as a right denied under Sec. 709 of the R. S. is one of general law and not a right in plaintiff specially set up under an act of Congress and, that the writ of error, should be dismissed or the judgment affirmed.

(signed) H. Bisbee
Geo. C. Bedell,
Attys for Defendant in error.